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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1039

WILLIAM C. HAAS & CO., INC.,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION

The respondents, by their attorneys George Agnost, City Attorney for the City and County of San Francisco, and Burk E. Delventhal, Mark B. Kertz, Deputy City Attorneys, submit this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeal is reported at 605 F.2d 1117 (1979) and is appended to the petition for a writ of certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the petition. The Clerk of the Court has extended respondent's time in which to file a brief in opposition to and including February 27, 1980. Supreme Court Rule 34(5).

QUESTIONS PRESENTED

1. **Whether the United States Court of Appeals for the Ninth Circuit in sustaining the trial court's order of summary judgment holding that land use regulations which reduced the fair market value of the subject land but which still allowed reasonable uses of the property do not effect a taking of property within the meaning of the due process clause of the 14th amendment, has decided an important federal question in a manner which conflicts with applicable decisions of this court.**

2. **Whether the United States Court of Appeals for the Ninth Circuit in sustaining the trial court's order of**

summary judgment holding that land use regulations which reduced the fair market value of the subject land but which still allowed reasonable uses of the property do not effect a taking of property within the meaning of the due process clause of the 14th amendment, has decided an important question of federal law which has not been, but should be, settled by this court.

STATEMENT OF FACTS

On June 28, 1971, Haas entered a land purchase agreement to buy a large parcel of unimproved land in the Russian Hill neighborhood of San Francisco. The agreement was conditioned upon Haas' procurement of a valid site permit from the requisite city agency. When Haas first applied to the San Francisco Planning Commission for a site permit, on July 7, 1971, the property was zoned R-5, permitting the high-rise development that Haas proposed. The City Planning Commission denied the permit on the ground that the project would have a detrimental effect on the City as a whole and upon the residents and property of the neighborhood. The Commission also relied upon an "Urban Design Plan," containing general environmental policies for the City developed over several years to be included in the City's Master Plan. Haas appealed to the Board of Permit Appeals on August 13, 1971. Two weeks later, while the appeal was pending, the Commission formally adopted the Urban Design Plan as part of the Master Plan of San Francisco. On August 26, 1971, the Commission adopted interim controls establishing height and bulk restrictions which, among other things, limited the maximum height to 300 feet. Haas withdrew its appeal, and on November 9, 1971, submitted new plans for approval by the Commission. The new plans as amended complied with the 300-foot height restriction as well as the bulk restriction. After a public hearing, the Commission approved the application for the site permit on the revised plans. The neighbors' efforts to stop the high-rise project failed when the Board of Permit Appeals, approving the permit, denied a petition for rehearing on April 10, 1972.

Haas immediately broke ground and commenced the construction project. The Russian Hill Improvement Association was equally prompt in taking steps to halt the project. On April 20, 1972, the Association filed a petition for writ of mandate in the Superior Court in San Francisco, Haas won the first round in the trial court, but the California Court of Appeal overturned the Superior Court and issued the writ on the ground that the permit was invalid for failure to comply with the California Environmental Quality Act of 1970 and the 1972 amendments thereto (Pub. Resources Code §§ 21000-21174). The California Court of Appeal held that Haas was not protected by the grandfather clause because Haas had not undertaken substantial construction and incurred substantial liabilities for construction in good faith reliance upon the issuance of a permit prior to the commencement of judicial proceedings. (*Russian Hill Improvement Association* v. *Board of Permit Appeals* (1974) 44 Cal. App. 3d 158, 164, 118 Cal. Rptr. 490.) Haas' efforts to foreclose application of the environmental laws to it on constitutional grounds failed in the California judiciary and in the United States Supreme Court. (*William C. Haas & Co., Inc.* v. *Russian Hill Improvement Association,* (1975) 422 U.S. 1030 (dismissing appeal for want of substantial federal question).

While the issue of petitioner's compliance with the California Environmental Quality Act of 1970 and as amended, was before the California Court of Appeal, the City Planning Commission had adopted a 40-foot height limitation, promulgated density controls, and rezoned the property from R-5 to R-3.

Petitioner then filed this case in the federal district court in April, 1975, in which it challenged the constitutionality of the rezoning and other land use restrictions as applied to its Russian Hill property, contending that the combined impact of the restrictions destroyed the value of the property and that it was entitled to over ten million dollars to compensate it for

both the diminution in the value of the property and consequential damages flowing from frustration of its planned development.

The federal district court granted respondent's Motion for Summary Judgment. Petitioner filed, in timely fashion, a Notice of Appeal for the Ninth Circuit.

The United States Court of Appeals for the Ninth Circuit (hereinafter Ninth Circuit) entertained both written and oral argument. The Ninth Circuit affirmed the judgment of the district court holding that "on the undisputed facts, Haas, as a matter of law, could not successfully maintain its inverse condemnation action. . ." 605 F.2d 1117 at 1119.

Petitioner then petitioned this Court for a writ of certiorari to the Ninth Circuit.

ARGUMENT

I.

PETITIONER HAS NOT PRESENTED QUESTIONS UNDECIDED BY THIS COURT, OR FOR WHICH A CONFLICT BETWEEN THE COURTS EXIST.

This Court should not grant certiorari because petitioner has not presented issues involving special and important federal questions requiring a new or different interpretation by this Court.

This Court's own Rule 19(b), a guideline for determining whether to grant a writ of certiorari, provides, in relevant part:

> Where a court of appeals . . . has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the court's power of supervision.

The questions presented by petitioner are not ones which have "not been but should be settled by this Court." Rule 19. This Court has considered the question of when a state enacted land use regulation amounts to a taking since the late 19th century. *Mugler* v. *Kansas,* 123 U.S. 623 (1887). This Court has considered the use of comprehensive zoning ordinances for over 50 years. *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926).

In resolving this case the courts below fully considered the applicable decisions of this Court. The Ninth Circuit reaffirmed this Court's established holding that the adoption of a land use regulation within the state's police power does not amount to a taking for which compensation must be made. Writ of certiorari should be granted only when the decision of the lower court(s) is in direct conflict with applicable decisions of this Court.

Respondents have received a copy of a letter from Petitioner addressed to the Clerk of this Court, dated January 9, 1980, requesting the Clerk to bring "to the immediate attention of the Court" petitioner's claim that the questions presented in *Agins* v. *City of Tiburon, California,* (1979) 23 Cal.3d 605, are "obviously parallel" to the instant case.

Agins v. *City of Tiburon* is inapposite to the questions presented in the case at hand. The question in *Agins* was whether a state court holding declaratory relief or mandamus the exclusive remedy for a landowner who claims that a land use regulation has unreasonably restricted his property rights violates the due process clause of the 14th amendment.

The Supreme Court of California decided that "inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." 23 Cal.3d 605 at 614. Instead, according to the court in *Agins,* a landowner may attempt through declaratory relief or administrative mandamus to invalidate the ordinance as excessive regulation in violation of the 14th amendment of the U.S. Constitution and Art. I Section 19 of the California Constitution.

The court in *Agins* did not consider whether a 'taking' had occured (albeit it hinted that it had not). The question was only which remedy was available to the plaintiff Agins. The questions presented here by petitioner Haas are concerned with a different issue: the existence or not of a 'taking'. Therefore *Agins* does not provide a reason for granting the writ.

II.

THE REGULATIONS IN QUESTION DO NOT CONSTITUTE A TAKING

A. Historical Background of the "Taking Clause" of the Fifth Amendment as Incorporated by the Fourteenth Amendment.

In order properly to understand the question in the instant case, it is appropriate to examine the historical basis of the Fifth Amendment of the United States Constitution which provides in relevant part "Nor shall private property be taken for public use, without just compensation."

In drafting the Fifth Amendment the founding fathers indicated no concern for the power of the state to impose land use regulations. During the first half of the nineteenth century the Fifth Amendment was interpreted to limit the concept of a "taking" to the physical taking. See William B. Stoebuck "A General Theory of Eminant Domain" 47 Wash. L.Rev. 553, 575 (1972). See also *Commonwealth* v. *Alger* 7 Cush. 53 (Mass. 1853); *Baker* v. *Boston* 12 Pick 183 (Mass.) (1831).

Early U.S. Supreme Court decisions accorded equally broad power to the legislature to impose land use regulations. See *CB&Q* v. *Chicago* 160 U.S. 26 (1890) (incorporating the taking clause of the Fifth Amendment into the due process clause of the Fourteenth Amendment); *Transportation Co.* v. *City of Chicago* 99 U.S. 635 (1878) and *Richmond Fredericksburg & Potomac Ry. Co.* v. *Richmond* 96 U.S. 521 (1877) upholding a regulation which prohibited the operation of railroad or public streets. Said the court at 528-529,

> "The power to govern implies the power to ordain and establish suitable police regulations... Appropriate regulation of the use of property is not a 'taking' of property, within the meaning of the constitutional prohibition."

The leading early case was *Mugler* v. *Kansas* 123 U.S. 623, 8 S.Ct. 273 (1887) in which P owned a brewery which, by virtue of state prohibition, was rendered worthless. Said the court at 668-669,

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. *Such legislation does not disturb the owner in the control or use of his property for lawful purposes,* nor restrict his right to dispose of it, *but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.* Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law."

The police power must not be "burdened" with requirements of compensation, suggested Harlan:

> "The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other,

unoffending property is *taken away* from an innocent owner." (emphasis added)

Thus deeply imbedded not only in our law but also in the common law of England is the principle that all private property is held subject to the power of the state to regulate its use for the commonweal. This perspective of the accommodation between private interest and the public will compels the conclusion that the regulations in the instant case have not exceeded the strictures of the due process clause.

In the case of *Hudson Water Co.* v. *McCarter* 209 U.S. 349 (1908) Mr. Justice Holmes writing for the court stated in very broad terms that substantial powers were vested in the government in the area of environmental protection. Said the court at pages 355-357,

> "It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. *But it is recognized that the state, as quasi-sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.*
>
> "*We are of opinion, further, that the constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs.* The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all

> admit to be a great public good and what it has it may keep and give no one a reason for its will." (emphasis added)

And in *Pennsylvania Coal* v. *Mahon* 260 U.S. 393 (1922) Mr. Justice Holmes stated,

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in general law."

And in *Tyson Bros.* v. *Banton* 273 U.S. 418, 446 (1926) the court noted at " . . . Property rights may be taken for public purposes without paying if you do not take too much [since] some play must be allowed to the joints if the machine is to work."

Appellant refers repeatedly to the fact that there is no fixed rule and that each case must be decided on its own facts. However, this does not change the fact that on *undisputed* facts whether there is a taking is purely a question of law. The uncontroverted factual material developed in the trial court, uncontroverted by petitioner below established repondent's entitlement as a matter of law to a judgment.

B. Recent Interpretations of the "Taking Clause."

As noted above the federal government under the Fifth Amendment and the states under the Fourteenth Amendment to the United States Constitution may regulate the use of private property provided such regulation is reasonably related

to the public health, safety, morality or general welfare. *Goldblatt* v. *Hempstead* 369 U.S. 570, 8 L.Ed2d 130, 82 S.Ct. 987.[1][2]

For the purposes of the instant inquiry the question is whether the regulation has gone so far as to constitute a taking. In *Pennsylvania Coal Co.* v. *Mahon* 260 U.S. U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158 (1922) (hereinafter referred to as *Penn Coal*). The Court in characteristically aphoristic language stated,

> "The general rule is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

[1] The Fifth Amendment to the United States Constitution provides in relevant part, ". . . nor shall private property be taken for public use without just compensation . . ." The Fourteenth Amendment's due process clause has been held to incorporate the same proscriptions. *Chicago Burlington & Quincy Ry.* v. *Chicago* 166 U.S. 26 (1896). The California Constitution's provisions provide more protections to the property owner. Article I, section 7(a) provides ". . . . due process of law . . ." Article I, section 19 of the California Constitution provides in relevant part, "Private property may be taken or *damaged* for public use only when just compensation . . . has first been paid . . ." (Emphasis added.) The fact that the California Constitution requires compensation in the event either of the taking or a damaging renders California authorities on when compensation is required even more compelling in light of the fact that California accords by virtue of its own constitution broader protections than are accorded to property owners under the Fourteenth Amendment of the United States Constitution.

[2] There is an important distinction to preserve between whether a zoning regulation is reasonably related to a permissible public purpose (resolved in favor of respondent by the Ninth Circuit and not argued by petitioner before this Court) and the issue now to be addressed as to whether the regulation constitutes a taking. *Nectow* v. *Cambridge* 277 U.S. 183, 188, 72 L.Ed. 842, 844, 48 S.Ct. 447 (1928). In the *Nectow* case the Court never addressed the taking issue ruling that the private burden on the individual property owner so far outweighed the public benefit to be derived from the regulation as to render the regulation unreasonable.

In equally unhelpful language the Court in 1962 upheld regulations on gravel removal stating in *Goldblatt* v. *Hempstead* 369 U.S. 590, 8 L.Ed.2d 130, 133-134, 82 S.Ct. 987,

> "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation."

And then the court in *Goldblatt* stated at page 134,

> "There is no set formula to determine where regulation ends and taking begins. Although comparison of values before and after is relevant, it is by no means conclusive . . . How far a regulation may go before a taking we need not now decide . . ."

So the trial court's problem in this case was to decide how far was too much and then to determine whether on uncontroverted facts the City was entitled, as a matter of law, to judgment.

Initially some aid in understanding Mr. Justice Holme's comments in the *Penn Coal* case can be found in a review of *Hudson Water Co.* v. *McCarter* (supra) 209 U.S. 355 in which Mr. Justice Holmes writing for the court stated,

> "The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. *For instance, the police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of*

> *property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.* (Emphasis added)
>
> It sometimes is difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point." [Emphasis added.]

Therefore one point "in the line" "fixed by decision" relates to height limits on buildings and holds that there is not a taking unless the City "should attempt to limit the height so far as to make an ordinary building lot wholly useless . . ." The second amended complaint concedes and the declaration of Robert Passmore emphasizes that there is a plethora of permitted uses which render specious and erroneous as a matter of law any claim that the parcel in question has been made wholly useless. That impairment of value in and of itself is not enough to constitute a taking has been reaffirmed in many cases. See *Euclid* v. *Ambler Realty* 272 U.S. 365, 384 (1926) holding valid a zoning regulation in spite of the fact that the value of the affected land declined from $10,000 to $2,500 per acre.

The court's discussion of the rationale for the legislation is prophetic not only in the context of the Village of Euclid but also for the purposes of the instant case where plaintiff claims entitlement to erect a three hundred foot structure in the middle of a residential neighborhood.[3]

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[3] Appellant claims either that he is entitled to erect the structure or that he is entitled to compensation for a taking. That these alternative contentions offer the City a classic Hobson's choice cannot be gainsaid. Should the City be required to compensate every property owner for the decline in value of his property due to stricter regulations on intensity of use, the City would be compelled to abandon all attempts at land use regulation.

Said the court in *Euclid at* 277 U.S. 365, 394-395,

> "These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc. With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; *that in such sections very often the apartment is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances,* [395] *apartment houses,*

which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.[4]

See also *Hadacheck* v. *Sebastian* 239 U.S. 394, 60 L.Ed. 348, 36 S.Ct. 143 (1915) in which the Court upheld a land use regulation which resulted in a diminution in value from $800,000 to $60,000. And in *HFH Ltd.* v. *Superior Court* 15 Cal.3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975) cert. denied 425 U.S. 904 the Court upheld the regulation notwithstanding declining value from $400,000 to $38,000.

The Penn Coal case must be read both in the context of other cases of that era and in recognition of the unique facts of that case which dealt not with the traditional accommodation of private and public interests inherent in the exercise of the policy power.[5] On the contrary this case involved a specific property

[4] It is recognized that the Euclid case dealt primarily with the claim that the legislation in question was an arbitrary exercise of the police power and therefore its enforcement could be enjoined. And the taking issue was not raised. However, since the Euclid case followed closely the Penn Coal case, since it involved a claim of substantial reduction in value by virtue of the zoning regulation, and since it involved the first case in which the Supreme Court reviewed a comprehensive zoning regulation, it is significant that the court, having ruled the regulation to be a valid exercise of the police power did not consider as meriting attention the possible contention that the property had been taken from a private owner for public purposes.

[5] Once cave-ins began in the Penn Coal case no further mining would be allowed. Thus the reserved mining right, the only interest

(footnote continued on following page)

right reserved by a grantor and a state statute which inevitably would render that property worthless.[6]

In addition to the Penn Coal case, appellants have relied on *Nectow* v. *Cambridge* (supra) 277 U.S. 183, to support their contention that the trial court erred in concluding that there has been no taking. The Nectow case turned on the determination of the trial court noted at 277 U.S. 187,

> ". . . that the districting of the plaintiff's land in a residence district would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant City, taking into account the natural development thereof and the character of the district and the resulting benefit to accrue to the whole city . . ."

It is clear that the Nectow case turned on the question of the rationality of the exercise of the police power and not on the taking issue.

Appellants place great reliance on another finding of the special master appointed by the trial court noted at 277 U.S. 187,

> " 'that no practical use can be made of the land in question for residential purposes, because among

(footnote continued from previous page)
reserved, was rendered totally worthless. In an industrial, capitalistic society, where the private right to expropriate and exploit natural resources (especially energy resources) is considered sacrosanct, the result in the Penn Coal case is not surprising. Also with still large, untapped reserves of open space, this country was hardly concerned in 1927 with the preservation of living environments. The disaffected citizens indulged in the traditional hegira to the west. Now we in the west are shouldered with the burdens of over-population. There is no more open space and there is no room for westward migration. Therefore, attention must be directed at preserving existing open space.

[6] There is no claim in the instant case that the property has been rendered worthless.

> other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property.' . . .

A reading of the *Nectow* decision clarifies its critical element as,

> "Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained."

In other words, both the special master and the trial court found that the legislative calculus leading to the promulgation of the regulations was totally erroneous and that there was no basis in reason for the conclusions set forth in the regulations in question.

These cases stand neither for the proposition that a fact question is always presented when an exercise of the police power had been challenged or that the particular legislation in question constitutes a taking or is otherwise unreasonable.

III.

THE PROFITABILITY OF PERMITTED USES IN LIGHT OF THE COST OF PROPERTY AND AMOUNT SPENT IN PREPARATION FOR DEVELOPMENT IS NOT A PROPER BASIS FOR DETERMINING WHETHER THERE HAS BEEN A TAKING

In this section respondent addresses what constitutes the central issue in this case. Throughout appellant has contended in various ways that there has been a taking of his property for which compensation is required because, in light of what was paid for by the property and invested in preparation for development, no permitted use will enable appellant to recover his investment.

Profitability (return on investment to owner) may be an element of the calculus in arriving at a determination of whether there is some basis in reason for a zoning regulation. However, profitability should play no role in arriving at a determination as to whether a reasonable regulation adopted pursuant to the police power constitutes a taking. As noted above the issue in the Nectow case from which appellant draws the language relating to profitability was mentioned in the context of the claim that the legislation was arbitrary and unreasonable. Furthermore that language was just one factor in a decision and must not be considered controlling.

From the point of view of the administration of justice, such a rule of law could lead to unfair results. A property owner's claim that his property has been "taken" in that the zoning regulation is unreasonable should not turn on how much that property owner paid for his property. Otherwise, long-term property owners would be compelled to sell their property on the eve of the imposition of more restrictive zoning regulations for an inflated price (reflecting value under existing permitted uses) to a developer who could, in turn, subsequently contend that he is entitled either to an exemption from the

zoning regulations or to compensation for the taking of the property. The City's zoning regulations either would be fatally eviserated of their effectiveness as vehicles of land use reform or so costly as to render unfeasible land use reform directed toward preservation and enhancement of the living environment.

Petitioner ardently proffers *Penn. Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978), citing *Hadacheck, Nectow, Penn Coal,* and *Goldblatt* therein, as reaffirmation of the crucial, if not decisive, role of the diminished investment value theory.

Penn. Central involved a "comprehensive program to preserve historic landmarks and historic districts . . . [containing] structures with special historic, cultural, or architectural significance . . ." 438 U.S. 107, 108. According to Petitioner Penn. Central stands for the proposition that in determining whether there is a taking under the 14th Amendment's Due Process Clause this court must look beyond the magnitude of the loss of the owner under The Landmark Law, and consider the "reasonable return" (Br. at 17) possible on the property.

The term "reasonable return" was employed by the New York Court of Appeals in its review of the case below. The Court of Appeals in its employ of the term "reasonable return" 42 NY2d 324,333, 366 N.E. 2d 1271 at 1276, was discussing not the ability of the terminal to turn a profit (Petitioners there claimed it was operating at a loss even before the landmark designation) but whether the property was capable of making a reasonable return. Id. Further, reasonable return was not deemed to mean a profit acceptable to a large corporation, but an amount of return which could not be classified a denial of all reasonable return. Id. at 1273. The Court of Appeals stated at p. 1273 that " . . . government regulation is invalid if it denies a property owner all reasonable return. . ."

The term "reasonable" was further limited by that court where, at page 1273, it stated that : ". . .there is no constitutional imperative that the return embrace all attributes incidental influences, or contributing external factors derived from the social complex in which the property rests."

Therefore the term "reasonable return" does not relate to profit possible from the highest and best investment use of the property but rather to the capability of the property to produce some return as opposed to a denial of all reasonable return, without regard to profit.

In *Penn. Central,* supra 433 U.S. at 123, this court did "Review the factors that have shaped the jurisprudence of the Fifth Amendment . . . " This Court noted as factors: economic impact on the owner, the nature of the government action, i.e. physical invasion of the property or regulation, the effect on the health, safety, morals or general welfare of the public as understood in the police power, and zoning laws.

This Court in *Penn. Central* supra noted that when the land use is restricted under the police power the factor considered most improtant is whether the police power is served. If the police power is served then the regulation will usually be upheld. This Court said in *Penn. Central* supra 433 U.S. 125:

> More importantly for the present case, in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulation that destroyed or adversely affected recognized real property interests.

This Court also reaffirmed in *Penn Central,* supra at 125, that:

> Zoning laws generally do not affect existing uses of real property, but 'taking' challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions

> prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individualized harm.

Petitioner argues that its ". . .basic concept of land purchase is to buy land at a cost commensurate with the proposed construction," (Br. at 11) and that the price paid for the land was commensurate with a proposed highrise development. Petitioner argues that the height restrictions enacted by the city unreasonably reduce petitioner's hoped for return on investment. This Court in *Id.* at 130, explicitly rejected that argument:

> ". . .the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this court would have erred not only in upholding laws restricting the development of air rights. . .but also in approving those prohibiting both the subjacent [citing Goldblatt] and the lateral development of particular parcels.

Petitioner Haas also argues that the regulations enacted by respondent effected a taking because its operation significantly diminished the value of the affected land, (BR. at 11). An identical argument was raised in *Penn. Central,* 438 U.S. at 131. This court noted, and appellant *Penn. Central* conceded ". . .that the decisions sustaining other land-use regulations which are . . . reasonably related to the promotion of the general welfare uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'. . . the 'taking' issue . . . is resolved by focusing on the uses the regulations permit."

The arguments presented by petitioner Haas (along with several others no longer raised by Petitioner) were considered by the court below. The Ninth Circuit found (and Haas was

held "necessarily [to] agree") that "the zoning and the land use restrictions applied to its property did promote the general welfare by decreasing population density . . . preserved light and air available to neighbors and served the aesthetic values enjoyed by the City as a whole. *William L. Haas* v. *City and County of San Francisco,* 605 F.2d at 1120

IV

On the record before them, the trial and Ninth Circuit counts below properly concluded there was no genuine issue as to any material fact and that the land use regulation in question was a valid exercise of the police power. The loss occasioned on petitioner by virtue of the imposition of the regulation was insufficient to justify the conclusion that its property had been taken within the meaning of the due process clause of the 14th Amendment. The Ninth Circuit, *Id.* at 1120 noted that "Haas also recognizes that dimunition of the value of its property by destroying its highest and best use by land use restrictions reasonably related to the general welfare cannot be the basis for a successful constitutional attack." Nor did the Court of Appeals at p.1120 find for petitioner's claim that ". . . the nature, quality and amount of benefit to the general welfare is inadequate constitutionally to offset the individual economic burden . . ." Haas has to endure.

That court stated at 605 F.2d at 1120 that petitioner could still develop the property, albeit not as it planned. Petitioner's property had also "not been singled out from other Russian Hill properties and made to bear a disproportionate economic burden." All of petitioner's neighbors were subject to the same restrictions. Petitioner has suffered an economic loss, but although heavy it "did not convert the regulation into a 'taking.'" 605 F.2d at 1121

V.

THE COURT OF APPEALS FOR THE NINTH CIRCUIT PROPERLY SUSTAINED THE TRIAL COURT'S ORDER OF SUMMARY JUDGMENT IN VIEW OF UNCONTROVERTED FACTS AND SETTLED AND ESTABLISHED LAW.

The second issue is whether the trial court on uncontroverted facts, properly concluded, as a matter of law, that appellant could not overcome the constitutional presumption and sustain his burden of proving that the limitations on height of structures and density were "without any reasonable basis and therefore purely arbitrary," while recognizing that ". . . it is not enough that the measure in question results in some inequality or that it is not drawn with mathematical nicety." *Lindsley* v. *Natural Carbonic Gas Co.* 270 U.S. 61, 65 (1910).[7]

In light of the burden of proof and the correlative constitutional presumption involved in these cases, it is clear that the trial court and the Ninth Circuit properly ruled below that

[7] In fact this aspect of the case does not present an evidentiary question in the classic, summary judgment sense. As noted in *McGowan* v. *Maryland* 366 U.S. 420, 42526, 6 L.Ed.2d 393, 399 (1966),

> "Although no precise formula has been developed the court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside *if any state of facts reasonably may be conceived to justify it.*" (Emphasis added.) (Citations omitted.)

This language clearly demonstrates that the presumption is not merely an evidentiary one, but rather is constitutional in dimension. The court is enjoined to ferret out any factual basis that can be *conceived* (rather than proved) to justify the legislation.

there was no triable issue of fact regarding the rationality of the zoning regulations in question. The essential fact before the courts below were uncontroverted by petitioner. The Ninth Circuit followed the holding in *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, at 125 that:

> Land use restrictions, reasonably related to the promotion of the health, safety, morals, or general welfare, have been repeatedly upheld even though the challenged regulations destroyed or adversely affected recognized real property interests or flatly prohibited the most beneficial use of the property.

The Ninth Circuit held and "Haas necessarily agrees" 605. F2d. at 1120, that the regulations were reasonable in that they:

> . . . promote[d] the general welfare by decreasing population density in the Russian Hill area, preserved light and air available to the neighbors, and served the aesthetic values enjoyed by the City as a whole. . . .
>
> Haas' property has not been singled out from other Russian Hill properties and made to bear a disproportionate economic burden. The record contains not the slightest suggestion that the land use regulations at issue involved 'reverse sopt' zoning. On the contrary, the land use controls were part of a comprehensive plan for the development of the City to preserve aesthetic values and other general welfare interests of the inhabitants. The land use restrictions 'were reasonably related to the implementation of a policy. . . expected to produce a widespread public benefit and applicable to all similarly situated property.' [citing Penn Central at 133]. All of Haas' neighbors are subject to the same restrictions upon the future development of their property as those imposed on Haas. To be sure, at the moment, Haas appears to have suffered a disproportionate impact

> because no other affected landowner has as large a parcel of undeveloped land as does Haas. Nevertheless, all of the landowners in the Russian Hill area are no more able than is Haas to redevelop their property, either alone, or in combination with other landowners, for high-rise apartments.

The complaint originally submitted, it is contended by respondent, could have been resolved on a motion to dismiss in that the trial court easily could have conceived of some rational explanation for the height and density limits in question (not to mention the total absence in the plaintiff's complaint of any evidentiary allegations regarding the irrationality of the legislation.[8])

The federal judiciary has recently ruled "conclusory allegations, unsupported by factual data do not create a triable issue of fact." *California ex rel Department of Transportation* v. *United States,* 561 F.2d 731, 733 n.4 (9th Cir. 1977), and *King* v. *Fom Inv. Corp,* 563 F.2d 1316 (9th Cir. 1977)

This rule is even more applicable where the court is called upon by the complaint to invalidate the regulations of a co-equal branch of government.

Petitioner does not allege conflict as to the facts in this case, only that the issue of 'taking' should not be decided by an Order of Summary Judgment.

Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part, that if the records and affidavits, if any:

> show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.

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[8] The petitioner seemed to premise his contention on the fact that he had been granted a permit earlier on to do that which subsequently adopted regulations proscribed. Every reform has a date of inception and, if meaningful, substantially changes the ground rules. The fact of the cut off point hardly can be said to render the legislation invalid.

The motion for summary judgment lies whenever there is no genuine issue as to any material fact. The court does not try issues of fact; it only determines whether there are issues to be tried. *Pepper and Tanner, Inc.* v. *Shamrock Broadcasting, Inc.* 563 F.2d 391 (9th Cir. 1977).

This procedure empowers the court to render a judgment on the law when no disputed facts exist. See *General Electric Co.* v. *U.S. Dynamics, Inc.* 403 F.2d 933 (1st Cir. 1968) where the court held at p. 934 (with unusual poetics) that summary judgment was:

> available only when the effluent stream of controversy has been purified by the exclusion of any genuine issues of material fact.

The test for summary judgment at the trial court level is rigorous. It was perhaps best stated in *Fili Morelti Cereali* v. *Continental Grain Co.,* 563 F.2d 563, 565 (2d Cir. 1977) citing in part *Heyman* v. *Commerce and Industry Ins. Co.,* 524 F.2d 1317 (2d Cir. 1975). The trial court is required to:

> resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought [citation omitted], with the burden on the moving party to demonstrate the absence of any material fact genuinely in dispute.

In *Pepper,* supra, it was held at p. 393, that the trial court could not enter a summary judgment which "rests on a chain of inferences from subsidiary facts not conclusively established on the record."

The Ninth Circuit in reviewing the grant of summary judgment by the trial court was required to apply the same test initially employed by the trial court. *Radobenko* v. *Automated Equip. Corp*, 520 F.2d 540 (9th Cir. 1975).

In applying the test the Ninth Circuit was required to review the evidence and when inferences were to be drawn therefrom to do so in the light most favorable to petitioner here.

Id. at 543. The Ninth Circuit considered the proceedings and evidence below and found respondent entitled to prevail as a matter of law.

Petitioner does not allege a conflict of material fact. Instead, petitioner claims that the standards employed by this Court since *Penn Coal* v. *Mahon,* supra, are so undefined that they can not be employed to decide a motion for summary judgment. (Br. at 21)

Petitioner confuses the distinction between matters of law and fact. Petitioner stated at page 21 of its brief: "It is essential that the question of whether there has been a taking turn on the peculiar and unique factual circumstances of each case and not simply on general principles of law."

The summary judgment granted below was ordered precisely because there was "no genuine issue of a material fact." FRCP 56. Therefore, presentation of the case to a jury was unnecessary and contrary to the very purpose of Rule 56.

Petitioner should not be permitted now to argue that the weight of the facts does not support an order of summary judgment, and also argue that there is no precise standard as a matter of law to apply to those facts. This Court has decided cases on comprehensive zoning since 1926; standards are well understood by the courts below. Therefore, summary judgment as a remedy should not be considered "quite rare in taking cases" (Br. at 21). The facts are uncontroverted and the standards established over 50 years ago. What petitioner overlooks in its argument is that on uncontroverted facts the trial court's analysis of the issues involved solely a question of law.

The issues in this case were analyzed by the trial court and the Ninth Circuit. In each instance the courts below concluded that those uncontroverted facts did not amount to a taking. What other facts conceivably might have been produced were petitioner to have another chance to try the case is immaterial.

The trial court, in its consideration of respondent's motion for summary judgment rendered its judgment on the record before it. This is the precise nature of the summary judgment proceeding. Petitioner's insistence on the need for a trial misapprehends the basic concept of a summary judgment proceeding.

CONCLUSION

The court below determined correctly that the respondent's motion for summary judgment should be granted. The Petitioner failed to provide the courts below with any contradictory facts to sufficiently raise any material issue of fact and the applicable law on the specific legal issues raised is such that a determination in favor of the respondents was necessary.

The fact that no question has been presented here which this Court has not already long decided upon, or is a matter of conflict between the several courts below, no writ of certiorari should be granted.

Dated:

Respectfully Submitted,
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